Case No. 49669-1-II

Clallam County Cause No. 13-2-01120-7

In the Court of Appeals, Division II
For the State of Washington

ROBERT E. TUTTLE JR.,

Appellant,

vs.

ESTATE OF ANITA D. TUTTLE, Patricia Hicklin, Personal Representative; TUTTLE FAMILY LIMITED PARTNERSHIP, Eric Anderson, General Partner; ROBERT E. TUTTLE SR. TESTAMENTARY TRUST u/w/d 11/17/1993, Patricia Hicklin, Trustee; and PATRICIA HICKLIN and SIDNEY HICKLIN, Sr. husband and wife.

Respondents.

Respondents Robert E. Tuttle Sr. Testamentary Trust And Patricia Hicklin And Sidney Hicklin's Brief

---

Shane Seaman
WSBA #35350

Cross Sound Law Group
18887 Hwy 305, Suite 1000
Poulsbo, WA 98370
360-598-2350
Shane@crosssoundlaw.com

Contents

Table of Authorities

Cases

Statutes

Other Authorities

A. INTRODUCTION

Appellant Robert E. Tuttle Jr. (herein Tuttle), did not properly bring claims in this case that Patricia Hicklin and Sydney Hicklin (herein Hicklin) or the Robert E. Tuttle Sr. Testamentary Trust u/w/d 11/17/1993 (herein Trust), trespassed and wrongfully logged in 2010-2011 property Tuttle now claims as his (CP 298-299). He is attempting to finesse in his appeal claims that were never before the trial court to resolve.

The trial court did not err in dismissing the claims against Hicklin and the Trust. Tuttle made vague claims that Hicklin abused a power of attorney after the Tuttle Family Limited Partnership (FLP) logged on Lot 1 in 2010-2011. Hicklin and the Trust raised affirmative defenses including Tuttle failed to comply with RCW 25.10.706 and CR 23.1 (CP 294). Tuttle then demanded the FLP, owner of the logged property, pursue a claim for damages as a limited partner and that he was harmed by Anita Tuttle's (deceased, herein the Estate) logging in 2010-2011 and/or by Hicklin use of a power of attorney after the logging occurred when Hickling signed a Department of Natural Resources Natural Regeneration Plan. (CP 226).

Tuttle made the demand on FLP to pursue claims without reserving the right to preserve his claim that it was actually his property, not FLPs that was logged. FLP then sued the Estate, Hicklin and the Trust based

upon the same unspecific allegations. Clallam County Superior Court Cause No 14-2-00463-2 (CP 315) (Herein "FLP case"). Tuttle sat on the sidelines and waited, he did not set for trial or engage in discovery.

Hicklin and the Trust defended FLP's claims. Dismissal of FLP's case was granted, Hicklin and the Trust awarded attorney fees and the case was not appealed. (CP 313). Hicklin and the Trust moved for dismissal on the merits in this lawsuit, and under the doctrine of res judicata. (CP 250)

B. RELEVANT PORTIONS OF THE RECORD (CP)

Complaint	Clerk's Papers 296
Defendants Hicklin's Answer	Clerk's Papers 250
Declaration of Patricia Hicklin	Clerk's Papers 404
Hicklin and Trust Motion for SJ	Clerk's Papers 250
Declaration of Robert Tuttle W/ Exh.	Clerk's Papers 185
Amended Complaint	Clerk's Papers 161
Memo Opinion (2/22/16)	Clerk's Papers 132
Memo Opinion RE Hicklin/Trust SJ (4/26/16)	Clerk's Papers 117
Order Granting Hicklin/Trust SJ (10/31/16)	Clerk's Papers 92

Cause No: 14-2-00463-2 – FLP case

Complaint	Clerk's Paper 315
Order Granting Hicklin/Trust SJ (12/19/2014)	Clerk's Papers 313

C. RESPONSE TO STATEMENT OF ISSUES AND ASSIGNMENT OF ERRORS

The trial court did not err in dismissing the lawsuit. The trial court correctly analyzed the case and determined that Tuttle's claims as they pertained to Hicklin and the Trust are res judicata. Even if not dispositive under that doctrine, on the merits, Tuttle failed to raise genuine issues of facts with competent evidence. He brought claims based upon speculation and the court was correct in dismissing as a matter of law.

D. PROCEDURAL BACKGROUND

Tuttle's factual recitation of the procedural background leaves out key elements that pertain to Hicklin and the Trust. Tuttle utterly fails to recognize that Hicklin and the Trust moved for dismissal in the first lawsuit on the merits, which now bars these claims.

1. Breach of Fiduciary Duty Claims.

Tuttle filed his lawsuit here, alleging that Patricia Hicklin "has or may have also acted under purported authority derived from a power of attorney or other document delegating authority to her to act for or on behalf of Anita D. Tuttle while she was living. In this regard she acted or may have acted as General Partner of the Tuttle Family Limited Partnership." *Complaint 1.2* (CP 297). Tuttle also alleged that Hicklin acted on behalf of the trust or

for herself personally. (CP 297). Tuttle alleged that "Patricia Hicklin may have acted improperly, in breach of the trust, and otherwise in breach of duties owing to the beneficiaries thereof including plaintiff. *Complaint 2.3* (CP 298-299). The allegation that Patricia Hicklin abused a power of attorney in some manner while acting as Anita's agent is the foundation of Tuttle's claims.

Tuttle claims that at some point the responsibilities of being the Trustee "may have been delegated to, assumed, or performed by Patricia Hicklin although she is not the designated successor trustee." *Complaint 2.3* (CP 298-299). However, Tuttle's claim is not backed up by any evidence and in fact contradicts the plain language of the Trust.

> 3.5 Trustee. I appoint my spouse, Anita D. Tuttle, as my Trustee. In the event she is or becomes unable or unwilling to act, I appoint Doreen Hunt and Patricia Hicklin as co-Trustees.

Trust, paragraph 3.5. (CP 414) Patricia Hicklin became a successor trustee upon Anita's death. Tuttle fails to state with any specificity what Hicklin or the Trustee (at the time it was Anita) did using the power of attorney in 2010-2011 that allegedly caused damage, what duty either owed to Tuttle or how some unspecific act or acts constitute a breach of a duty owed by Hicklin to Tuttle. (CP 297-299)

Tuttle did not bring any of his claims against FLP or against Anita Tuttle while Anita was alive concerning a breach of duty. After Anita's death, Tuttle now appeared to be complaining about logging that occurred in 2010-2011 while Anita was alive. Although Tuttle never clearly spelled it out in his complaint, through subsequent declarations filed by him in response to the summary judgment motions he insinuated that Hicklin used the 2009 power of attorney in a manner that may have deprived him of some amounts owed to him after the 2010-2011 logging. (CP 192) Tuttle failed to raise genuine facts to support his claims.

The FLP owned the property that was logged and the Trust owns 744.19 Limited Partnership units of the FLP. (CP 405). From the outset, one of the major problems with Tuttle's theory is that Anita Tuttle, as the general partner of FLP, was entitled to the majority of proceeds and as the beneficiary of the Trust, Anita was entitled to all income while she was alive. ("Trustee shall distribute the entire net income from this trust" Trust, Art. IV 4.3) (CP 414). Also per the Trust, upon Anita's death, all income from the logging was to be distributed to the Estate ("Any undistributed income on hand at the time of the death of Trustor's spouse shall be distributed to the personal representative of her estate." Trust, Art. IV 4.3). (CP 414) Thus the facts before the court show that Tuttle did not suffer any actual harm.

2. Title Claim.

Tuttle's claim regarding title to Lot 1 is based upon theories that go directly against Anita (now the Estate) and adverse possession against FLP. (CP 301-305) Tuttle supported his claim by attaching two creditor's claim filed in the probate case, *In Re Matter of Estate of Anita D. Tuttle*. # 13-4-00204-3, including Tuttle's filed on September 19, 2013. (CP 301-305). Tuttle claimed ownership of Lot 1, under incompatible theories of theory of adverse possession, constructive trust, resulting trust, parol agreement, implied partnership, joint venture, estoppel unjust enrichment and any other possible legal theory that might apply. (CP 304). Tuttle conceded in his complaint however that this property was owned by FLP. *Complaint 2.1* (CP 298). The undisputed fact is that Anita Tuttle transferred ownership of the property to FLP in August 2000. (CP 33).

3. Accounting Claim.

Tuttle also alleged that he was entitled to an accounting from the Estate and the Trust pertaining to activities related to the 2010-2011 logging. (CP 299) Tuttle demanded an accounting and a judgment for declaratory relief and/or damages against the Trustee and Hicklin. (CP 299). He did not allege trespass.

4. Estate, Hicklin and Trust's Answer.

In the pleadings Tuttle's claims against Hicklin and the Trust are extremely vague, with no exact time periods when the harm occurred and no specific facts. Affirmative defenses were raised including that Tuttle's complaint fails to state a claim upon which relief can be granted and the claims were barred by the statute of limitations. (CP 288 & 294). Tuttle was making claims that could only be made by FLP, since FLP owned the property. The right to the suit belonged to the limited partnership itself. Tuttle must sue derivatively in his name after making a demand, and the record is clear Tuttle did not make a proper demand prior to commencing his action. see RCW 25.10.706–.721. The Estate, Hicklin and the Trust raised affirmative defenses that Tuttle failed to comply with RCW 25.10.706 and CR 23.1. (CP 288 & 294).

5. FLP Brings Its Claims.

The general partner of FLP, Eric Tuttle, then commenced his own lawsuit on behalf of the FLP against the exact same defendants, *Tuttle Family Limited Partnership; Eric Anderson, as General Partner v. Patricia Hicklin et. al*. Case No: 14 2 00463 2. (herein "FLP case"). (CP 315 & CP 340).

Robert did not bring a derivative action on behalf of the FLP "because Robert had, in fact, made a demand on the FLP to bring these claims, which demand resulted in the filing of ca[us]e 14-2-00463-2"); *see also* (CP 373)(stating that Robert "was not a party to cause 14-2-00463-2 brought by the [FLP] and did not participate in any way" because "it was understood that this action was brought by the FLP with respect to issues which could only be brought by the FLP and not . . . Robert."). (Id)

In the FLP case, FLP alleged "on information and belief" Anita Tuttle granted an immediate effective durable power of attorney to Patricia Hicklin, on or about August of 2009. *FLP case Complaint* (CP 317-318). Then "on information and belief" on or about January 2010, Anita Tuttle became incompetent to perform her duties as the general partner of the Limited Partnership. *FLP case Complaint* (CP 318). Patricia Hicklin, allegedly using this power of attorney, may have assumed the duties of the general manager of the Limited Partnership. *FLP case Complaint* (CP 318). FLP then made some vague claims that logging proceeds were converted "by defendants" and some forest mismanagement practices diminished assets of the partnership. *FLP case Complaint* (CP 318). These allegations, like Tuttle's, were made without pointing to any specific facts or specifying the harm that was caused. Although never clearly stated in the claim, it became clear in later filings that the logging occurred in 2010-2011. This

alleged abuse of the power of attorney was the foundation of FLP's claims against Hicklin, and therefore it is now clear that FLP and Tuttle are making the exact same claim. *FLP case Complaint* (CP 315), *Complaint* (CP 296). However, not once in either the FLP case or in this case did anyone allege trespass by Hicklin in a properly filed complaint before the court.

6. Hicklin And Trust Mover For Dismissal On The Merits In FLP Case.

In the FLP case, the Estate provided an accounting to the FLP concerning the 2010-2011 logging proceeds. Subsequently Hicklin and the Trust moved for dismissal of the claims against them on the merits. The basis of the motion was (a) for failure to state a claim upon which relief can be granted, (b) the conclusory allegations against Patricia Hicklin failed to state a prima facie case as there was no alleged harm, (c) the claims were made beyond the Statute of Limitations (d) FLP's claim was barred under RCW 25.10.441 and (e) even if there was an alleged set of facts that Patricia Hicklin, acting as the agent of Anita Tuttle, breached some duty to FLP, the claim was barred by RCW 4.22.070, RCW 25.10.391, and RCW 25.10.321. On December 19, 2014, Clallam County Superior Court dismissed FLP's claims with prejudice (CP 313) and the

Court awarded a judgment against FLP in the amount of $5,000.00 for attorney fees and costs. It was not appealed.

7. In This Case, Hicklin And The Trust Move For Dismissal.

Since the more specific (although still unclear) allegations made in the FLP case were dismissed with prejudice, Hicklin and the Trustee moved for dismissal of Tuttle's exact same claims. (CP 250) The Estate also moved for dismissal. (CP 263). Hicklin and the Trustee made the same basic arguments as in the FLP case on the merits and added an argument that Tuttle's claims against Hicklin and the Trust are barred by the doctrine of res judicata or collateral estoppel and issue preclusion. (CP 250, CP 253-254).

The Estate also moved to dismiss the title claim. The Estate agreed it did not have standing to bring a motion regarding the disputed ownership claims between Tuttle and FLP. (CP 179). However, the Estate maintained it had limited standing to defend against the Property claim because (1) Tuttle had not dismissed the Estate from that claim, and (2) the claim itself implicated the Estate.

8. Tuttle Puts Amended Complaint In Record, Fails to Comply With CR 15.

Post hearing on the summary judgment motion, Tuttle filed a *Motion and Declaration to Amend Complaint*, with an attached proposed amended complaint. (CP 157). Tuttle did not note his motion for hearing per CR 15. He simply filed and waited.

Had Tuttle noted it for a hearing, Hicklin and the Trust would have responded and objected. While waiting for Tuttle to bring to the court his amended complaint, the trial court ruled on the summary judgment motions. Tuttle did nothing with his filing, and his dilatory action is an invited error.

9. Co-Trustee Hunt Interferes.

Unknown to Hicklin, the Trust or the Estate, Tuttle had also served co-Trustee, Doreen Hunt, of the Trust, an amended complaint making her a party, but did not serve anyone else. *Memo Opinion* (CP 105, 106-107) After the Estate, Hicklin and the Trust moved for dismissal of the claims against them, co-Trustee Hunt interfered and filed cross-claims against Hicklin, essentially alleging substantially similar claims as Tuttle, that Hicklin may have done something in the past that was a breach of trust and fiduciary duty. (CP 105). Hicklin did not file a motion to intervene, per CR 24.

10. Trial Court Renders Opinions And Dismisses Case.

Due to co-Trustee Hunt's filings, the trial court issued a memo opinion (CP 132) bi-furcating its ruling on the pending summary judgment motions, holding dismissing Hicklin and the Trust until a later date (CP 117 & CP 88). The trial court then made its decision pertaining to res judicata, including Tuttle's title claim on February 22, 2016. (CP 132). The trial court issued another opinion on April 26, 2016, ruling favorably for Hicklin and the Trustee's on their summary judgment motion. (CP 117). In the October 31, 2016, *Findings of Facts and Conclusions of Law*, paragraph 21, (CP 96 & 99) the Court determined that FLP alleged the same causes of action against the Defendants. Therefore, the record shows that the allegations made in FLP case and Tuttle's case are the same.

Subsequently, Hicklin and the Trust moved the superior court for an award of attorney fees based on RCW 11.96A.150 and the court granted the motion. Pursuant to its discretion under RCW 11.96A.150, the superior court awarded Hicklin and the Trust $17, 185.00 in attorney fees. (CP 85).

E. ARGUMENT

11. Summary Judgment Standard.

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Afoa v. Port of Seattle, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Summary judgment is appropriate where the nonmoving party fails to rebut the moving party's initial showing that no material issue of fact exists, and the moving party is entitled to judgment as a matter of law. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant moving for summary judgment may demonstrate the absence of a material issue of fact by showing the lack of competent evidence to support a plaintiff's claims. Young, 112 Wn.2d at 225 n. 1. Unsupported conclusory allegations are not sufficient to defeat summary judgment. Stringfellow v. Stringfellow, 53 Wn.2d 639, 641, 335 P.2d 825 (1959).

In the FLP case, FLP did not have evidence beyond conclusory allegations. It made vague claims against Hicklin and the Trust concerning the 2010-2011 logging activities based upon a statement that Hicklin may have abused a power of attorney, but did not bring one scintilla of evidence to back up the allegations. Tuttle's case is exactly the same. Summary judgment was appropriate and the court's decision should be upheld.

12. Response to Title Claim.

a) FLP Made Claims As Presumptive Owner Of Lot 1.

In the FLP case, the limited partnership alleged damage due to the 2010-2011 logging and conversion against the Estate, Hicklin and the Trust by claiming that (1) Anita and Hicklin intentionally interfered with logging proceeds belonging to FLP, (2) by either taking or unlawfully retaining it, and (3) thereby depriving FLP and its limited partners (Tuttle and the Trust) possession of proceeds as the rightful owner of the property. (CP 315) See Aldaheff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 619, 220 P.3d 1214 (2009). Tuttle either had actual or constructive notice of FLP's claims going forward, as he is a limited partner, and admits to this fact in his original complaint. Com*plaint 1.4* (CP 298). FLP's claim that it was damaged due to the logging is mutually exclusive to Tuttle's claim. If Tuttle assumed a different conclusion, that he was owner of the logged property, he had a duty to claim that the damage alleged in FLP's case was not a damage that ran to the FLP, but a damage that ran to him personally because he owned the property.

b) New Trespass Claim Give Hicklin And Trust Standing.

To have standing a party must be arguably within the zone of interests to be protected or regulated, and must show injury in fact, economic or

otherwise. Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution, 185 Wn.2d 97, 103, 369 P.3d 140, 143 (2016) (citations omitted). See also KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 166 Wn. App. 117, 129, 272 P.3d 876, 882 (2012).[1]

Tuttle claiming his cause of action is now trespass raises a justiciable controversy. A justiciable controversy exists if the parties have direct and substantial opposing interests in the dispute requiring a final and conclusive judicial determination. Biggers v. City of Bainbridge Island, 124 Wn. App. 858, 864, 103 P.3d 244, 247 (2004), aff'd, 162 Wn.2d 683, 169 P.3d 14 (2007). To establish standing a plaintiff must show, among other things, "a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief." High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986).

Tuttle alleged in his complaint that Hicklin abused the 2009 power of attorney, an identical accusation in the FLP case, dismissed with prejudice. For Tuttle to claim that the activities surrounding the alleged abuse of the power of attorney related to removal of trees from Lot 1, he must have a title interest (owner of the land owns the trees). Tuttle's claims regarding title against the Estate (CP 301), who transferred title to FLP in August

[1] Although these cases deal with challenges involving gov't action, the tests are relevant.

2000, are barred by statute of limitations RCW 4.16.040 and RCW 4.16.808. For FLP's claims against Hicklin not to have been frivolous, ownership of Lot 1 was presumed by all parties, something Tuttle did not disabuse FLP of.

The Estate argues there is no justiciable controversy between it and Tuttle regarding the title. That may be true with Hicklin and the Trust also, until Tuttle attempted to bootstrap a new trespass claim into the case. Like the Estate, Hicklin and the Trust wanted to be dismissed from frivolous claims after the accounting in the FLP case showed proper distribution of the logging proceeds. Hicklin and the Trust did not lay claim to title in the subject real property, Lot 1.

To illustrate the issue, assume that FLP won rather then lost its claim. Hicklin and the Trust theoretically would be subject to damages for breach of fiduciary duty and conversion surrounding the 2010-2011 logging, with the measure of damage being the lost value of the trees. Assume then that this court reverses the trial court, orders on remand that Tuttle can pursue his title claim. Assume that FLP settles and conveys Lot 1 to Tuttle. Tuttle wants his trespass claim to go forward, claiming damages for trespass based upon the same nucleus set of facts, with a measure of damage being the lost value of the trees. Hicklin is within the zone of interest of the title claim, because it going forward causes Hicklin to re-litigate the 2010-2011

logging, directly causing harm. Due to this double jeopardy, Hicklin and the Trust have standing.

The trial court did not err. It correctly held that Tuttle's title claim was dismissed. Tuttle was before the court, in the FLP case, in the limited capacity as a limited partner, and under RCW 25.10.016(8) notice of the FLP case and its claims is levied up him.

13. Response to Res Judicata Argument.

Tuttle's initial claim stated that he is a beneficiary of the Trust and that Patricia Hicklin acted as Trustee of the Trust. *Complaint 1.3* (CP 297). Tuttle alleged that at some unspecified point in time, Patricia Hicklin may have acted improperly, in breach of trust. *Complaint 2.3* (CP 299). Robert Tuttle demanded, as a beneficiary of the Trust, an accounting, (CP 299) related to the 2010-2011 logging activities. The only path for funds into the Trust was due to its ownership interest in FLP. Tuttle made claims as a beneficiary for an accounting and there is no dispute an accounting was provided to the parties in the FLP case after that lawsuit commenced. Tuttle's claims and the FLP claims involve the same parties and the same nucleus set of facts.

c) Res Judicata.

The term "res judicata" has been used by Washington courts and in scholarly literature to refer to the entire subject of the preclusive effect of judgments. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash.L.Rev. 805, 805 (1985). This includes the re-litigation of claims and issues that were litigated, or might have been litigated, in a prior action. Id. For res judicata to apply, a prior judgment must have "a concurrence of identity with a subsequent action" in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898, 900 (1995); Rains v. State, 100 Wash.2d 660, 663, 674 P.2d 165 (1983).

i. Subject Matter.

Both the FLP case and Tuttle claims are based upon the same identical alleged conduct, the 2010-2011 logging and the vague claim that Patricia Hicklin may have done something with the power of attorney related to the logging. (CP 226).

ii. Causes of Action.

In the FLP case, FLP alleged causes of action for an accounting, wrongful conversion and breach of fiduciary duty for activities by Anita

Tuttle and Patricia Hicklin related 2010-2011 logging. (CP 315). Tuttle's cause of action for an accounting and for a breach of fiduciary duty by the Trustee are the same and have already been litigated. (CP 296).

iii. Identity of Parties.

There must next be identity of parties. There may be an identity of parties even if the parties are different. Rains, 100 Wn.2d at 664, 674 P.2d 165. Identity of parties is a matter of substance, not form, and nominally different parties may be, in legal effect the same. Id. Thus, a party does not have to be identical in both suits, however, there must be at least privity between a party to the first suit and the party to the second suit. Loveridge 125 Wn.2d at 764. Privity is based upon a mutual or successive relationship to the same claim of title, right, property, or subject matter of the litigation. Id. There is no genuine issue of material fact that the claim by Tuttle is due to the logging activities on the FLP property. In this case, privity means Tuttle's legal relationship to the parties that were litigating the claims surrounding the 2010-2011 logging activities. Privity is established, because the relevant Trust property is the 744.19 limited partnership units of the FLP which owns the subject property that was logged, and Tuttle is a beneficiary of the Trust. Thus Tuttle was involved in the FLP case in that capacity. Tuttle also is a limited partner of the FLP, thus his interest

concerning whether there was a loss due to the logging activities was adequately represented, thus Tuttle was before the court in the FLP case.

iv. Quality of the Persons for or Against Whom the Claim is Made.

Parties may be nominally different and at the same time qualitatively the same. Rains, 100 Wn.2d at 664. Even though there may be nominal differences between Tuttle and FLP, Tuttle's claims here are derived through his membership as a limited partner in the FLP and as a beneficiary of the Trust. Qualitatively they are the same.

d) Claim Preclusion.

The term "res judicata" may also refer to limitations on the re-litigation of a claim, or cause of action. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash.L.Rev. 805, 805 (1985). "When used in this sense, res judicata is usually further subdivided into the doctrines of "merger" and "bar." The principles of merger apply when the prior judgment was for the claimant; those of bar apply when the judgment was for the party defending the claim." Id.

Merger and bar have modernly been referred to as "claim preclusion". Id. Used in this context, res judicata includes the idea that "when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be re-litigated,

or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding." Kelly-Hansen v. Kelly-Hansen, 87 Wn.App. 320, 328-29, 941 P.2d 1108, Div. II (1997). There is no simple or all-inclusive test to determine whether a matter should have been litigated in a prior action. Id. at 330. Rather, it is necessary to consider a number of factors in determining the issue. Id.

First, the court must consider whether the present and prior proceedings arise out of the same facts. Id. Second, the court must consider whether the actions involve substantially the same evidence. Id. Finally, the court must consider whether rights or interests established in the first proceeding would be destroyed or impaired by completing the second proceeding. Id. Tuttle's claims arise from the same nucleus set of facts as FLP's claims, and if Tuttle is allowed to now claim trespassing on property that everyone presumed in the FLP case was owned by the limited partnership, Hicklin and the Trust will be forced to re-litigate the same claims that were previously dismissed.

e) FLP Case Is The "Prior Action" That Was Adjudicated On The Merits

The Court must decide what is a "prior action" for purposes of res judicata. After FLP commenced its lawsuit, Hicklin and the Trust were faced with the vexing situation of simultaneous lawsuits pending against them based on the allegations concerning the 2010-2011 logging. Generally meaning, "*a matter judged*", res judicata is the principle that a matter may not, generally, be re-litigated once it has been judged on the merits. Tuttle claims that a "prior action" is the first one filed, not necessarily the first one resolved on the merits, incorrectly relying on this court's holding in Jumamil v. Lakeside Casino, LLC, 179 Wash. App. 665, 319 P.3d 868 (Div. 2 2014). This Court held that res judicata is an affirmative defense under CR 8(c) that is waived if it is not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties. There is no question that the Estate, Hicklin or the Trustee did not waive the defense, because they filed their motions under CR 12(b) and CR 56. Further this Court held that a claim for res judicata will not be considered for the first time on appeal, a deciding factor in the case. Jumamil 179 Wn.App 665.

Procedurally Jumamil is distinguishable. The second action against the party Newton was filed after the court summarily dismissed claims

against West and Coon. Plaintiff Jumamil had appealed the first action. West and Coons case was decided on the merits initially, and then reversed, and the Court noted that West and Coon cited to no authority that the final order in Newton's case would go back in time and apply to them under a new theory of res judicata raised for the first time on appeal.

In our case, Tuttle filed his action, but it wasn't adjudicated first, partly because Tuttle brought claims that belonged to FLP, not him, and since FLP is the titled owner of the property, its claims were handled first, after Tuttle made the demand on FLP to pursue them. Tuttle did not note his case for trial, engage in discovery, or move to join the FLP case to preserve his title claim. It was his obligation to bring forth competent evidence, his duty to prosecute the claim. Tuttle made the strategic decision to sit on the sidelines and wait. Hicklin and the Trust faced with two simultaneous lawsuits, first defended the one that appeared less frivolous, since all parties agreed that FLP was the titled owner of the property. It was adjudicated on the merits and therefore became the "prior action."

Hicklin and the Trust urge this court to find that "prior action" means the action first resolved, otherwise it frustrates the very purpose of res judicata when a litigant files, waits, lets another suit proceed and then when the ruling in the second suit is not favorable, starts prosecuting its case. Division 3 adopted a rule in for "on the merits" in Pederson v. Potter, 103

Wn. App. 62, 70, 11 P.3d 833, 837 (2000). In making its holding they quoted 14 LEWIS H. ORLAND AND KARL B. TEGLAND, WASHINGTON PRACTICE § 367 n. 1, which is relevant here:

> Broadly stated, preclusion principles developed under the rubric of res judicata and collateral estoppel are designed to prevent repetitive litigation of the same matters. A number of facts support this goal, particularly as it relates to claim preclusion. First, and most important, is the integrity of the legal system; a legal system that permits the litigation of the same claims again and again is hardly worthy of the name. There is no assurance that the second or third decision on a claim will be more reliable than the first. Second, is the element of finality and repose, both as a societal matter and as a matter affecting the successful litigant. Third parties, successors in interest, creditors, and other members of the commonality should be able to carry forward their affairs in reliance on a judgment duly entered. The successful party should not be subjected to the vexation and exhaustion of resources that repetitive litigation may entail. Thus, judicial resources are finite. The court should not be burdened by a party's desire for another chance, and perhaps yet another.

Pederson, 103 Wn. App. at 71.

f) FLP Litigated The Claims On Behalf Of The Limited Partnership.

After Hicklin and the Trust raised defenses to Tuttle's claims that the claims belonged to FLP, not Tuttle, (CP 288 & 294) he made his demand on FLP to pursue, because "it was understood that this action was brought by the FLP with respect to issues which could only be

brought by the FLP and not . . . Robert" (CP 373). Under RCW 25.10.701(2) a partner may sue another partner directly for a breach of duty owed to the partner only where the partner alleges an injury "that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership." Where the partner does not allege such an injury, the right to the suit belongs to the limited partnership itself, and the partner must sue derivatively in its name. RCW 25.10.701. Once FLP commenced its suit per Tuttle's demand, all claims based upon the nucleus set of facts concerning the logging were before the court. The real party in interest per CR 17 was pursuing the claims.

14. Response to New Trespass Claim.

A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along. Kirby v. City of Tacoma, 124 Wn. App. 454, 98 P.3d 827 (2004).

g) Tuttle Failed To Amend His Complaint Per CR 15- He Cannot Show Timber Trespass On His Facts

Tuttle invited error in this case, and cannot complain the trial court made a mistake dismissing his claims when he never actually brought a trespass claim before the court. When faced with a pending summary

judgment motion, Tuttle filed a motion to amend his complaint, but never actually set a hearing or moved to amend the complaint allowing the court an opportunity to rule.

> Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties.

CR 15. Hicklin and the Trust spent significant time and expense responding to Tuttle's claims as written. Tuttle alleged Hicklin abused a power of attorney. In his response to summary judgment he supported his claim by alleging Patti Hicklin signed an informal conference note, (CP 226) regarding reforestation requirements. He did not allege trespass.

A defendant may move for summary judgment on the ground that the plaintiff lacks competent evidence to make out a prima facie case. Young, 112 Wn.2d at 225–26 & n. 1. Tuttle has no evidence of unauthorized entry by Hicklin or that she acted in a way to directly cause the cutting of trees. Common law trespass is occurs when a person without authority intentionally enters land in the possession of another, causes a thing to do so, or fails to remove from the land a thing which he or she is under a duty to remove. Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d

677, 709 P.2d 782 (1985). Timber trespass under RCW 64.12.030 usually looks to evidence of entry, but the timber trespass statute can also apply when a defendant commits a direct trespass that causes immediate, not collateral, injury to a plaintiff's timber Jongeward v. BNSF R. Co., 174 Wn.2d 586, 606, 278 P.3d 157, 166 (2012). Tuttle cannot even make a prima facie case of trespass because his own testimony and information shows the person who did the logging was an independent operator, Darren Dach (CP 214). From this evidence he makes an allegation that Patricia Hicklin and Sydney Hicklin trespassed:

> *"In 2010 I noticed timber cutters on a portion of my property. I did not know what they were doing and told them to get off....Approximately a year later I learned a different logger had been hired to take trees off what I considered to be our property. I suspected Patricia Hicklin was involved in this."* (CP 190-191)

Nowhere in Tuttle's facts does he state that Patricia Hicklin or Sydney Hicklin Sr., actually entered the subject property and damaged trees or removed trees or that they directly caused the removal of trees. His evidence is that Patricia Hicklin signed a DNR Natural Regeneration Plan on behalf of Anita, post logging..

15. Response to Attorney Fees.

The superior court awarded Hicklin $17,185.00 in attorneys' fees pursuant to its discretion under RCW 11.96A.150 because, among other

reasons, Hicklin prevailed and successfully defended the trust and the marital community. (CP 78) Tuttle's argument for reversing that award is premised on this Court reversing the superior court. The Court should also affirm the attorneys' fee award as within the superior court's discretion pursuant to RCW 11.96A.150.

Additionally, because Hicklin was entitled to attorneys' fees below pursuant to RCW 11.96A.150, Hicklin is entitled to their attorneys' fees on appeal if they prevail. See RCW 11.96A.150 ("any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees"); see also In re Estate of Mower, 193 Wn. App. 706, 729, 374 P.3d 180 (2016). Hicklin also should be awarded attorney fees for responding to the trespass claim, as it was never properly before the trial court. If Hicklin prevails, this Court should award attorneys' fees.

16. Summary Judgment Was Appropriate On The Merits.

As this is de novo review, this court should affirm dismissal on the merits of the case even if Tuttle prevails that his claim is not barred by res judicata.

h) Accounting For 2010-2011 Logging Showed No Harm.

Tuttle alleges that the Trustee "may have" acted improperly, but fails to allege a single fact that establishes any causation or damage to the Plaintiff.

An accounting of FLP property was provided in the FLP case. The Trust and Tuttle are limited partners of FLP, and Tuttle therefore received an accounting. The proceeds were properly distributed.

Tuttle alleges no facts that the community of Patricia Hicklin and Sydney Hicklin has a duty to provide an accounting to Tuttle. Tuttle's claim for breach of fiduciary duty fails to state any facts that (1) the community owed a duty to Tuttle, (2) the community breached that duty, (3) resulting injury to Tuttle, and (4) that the claimed breach proximately caused the injury. See, Miller v. U.S. Bank of Wash., 72 Wash.App. 416, 426, 865 P.2d 536 (1994). Unsupported conclusory allegations are not sufficient to defeat summary judgment. Stringfellow, 53 Wn.2d at 641.

i) Breach Of Fiduciary Duty Is Speculative.

Tuttle alleges that his mother Anita Tuttle granted Hicklin a power of attorney. Then at another unspecified time or times Patricia may have done some unspecified act that somehow damaged Tuttle's interest in the Trust. Tuttle then clarifies the allegation in his declaration that Patricia Hicklin signed a DNR informal conference note for reforestation, a natural regeneration plan, on Anita's behalf (CP 226). Tuttle cannot simply make a bare allegation without first having facts to support his claim. "May have" is speculatory and not a cause of action upon which relief can be granted.

He must make sure his claim is (1) well grounded in fact not speculation; (2) it is warranted by existing law (3) and it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. However, even the more specific allegation of signing the DNR plan fails to show a necessary element, harm. Hicklin and the Trust did not personally log the property, it was Anita through the FLP. Tuttle was paid his share of the proceeds as evidenced by the accounting. He seems to posit that maybe, maybe some of that income should have been paid to the trust, but keeps conveniently ignoring that Anita was entitled to all trust income while she was alive, and upon her death, all left over proceeds, if any, were paid to the Estate. Tuttle has not been harmed, dismissal was correct.

Tuttle has not presented one scintilla of evidence that Anita Tuttle was incompetent or that she was unable to manage her affairs. No guardianship proceedings were started; no medical evidence has been alleged or offered that Anita was incapable or subject to some undue influence. Therefore, the bare allegation that Patricia Hicklin "may have" used the power of attorney in breach of trust is not backed up by a single factual allegation that gives Tuttle a cause of action against the Trustee or Hicklin.

j) Claims Of Conversion Are Not Supported By Any Evidence.

Tuttle makes an allegation that Patricia Hicklin, using her power of attorney, "may have" assumed duties of the general manager of the limited partnership and or duties of the Trustee of the Trust. Tuttle fails to state one act by Patricia Hicklin that (a) using her power of attorney (b) converted funds that he has an actual interest in and (c) Anita was unaware or incapable of not approving said alleged action. There can be no conversion of money unless it was wrongfully received by the party charged with conversion. 16 Wash. Prac., *Tort Law And Practice* § 14:16 (4th ed.) citing to Brown ex rel. Richards v. Brown, 157 Wash. App. 803, 239 P.3d 602 (2010) and other cases. Claims that Hicklin failed to manage FLP assets are not supported by evidence, and belong to FLP, not Tuttle.

Tuttle also makes allegations Hicklin breached a fiduciary duty in failing to manage FLP assets. He offers no theory or facts that the DNR reforestation requirement in the natural regeneration plan caused harm (CP 226) (an identical problem FLP had). Tuttle fails to offer any evidence of any specific conduct that Patricia Hicklin engaged in that (a) shows she owed a duty personally to Tuttle when acting, (b) her action breached her

personal duty to Tuttle (c) resulted in injury to Tuttle and (d) was the proximate cause of Tuttle's injury.[2]

k) Hicklin Is Shielded From Liability As The Agent Of Anita

Hicklin, by the alleged power of attorney, is the agent of Anita, thus her duty was to Anita, and it's the Estate, not Hicklin that is liable, if there is any actual theory of liability. See RCW 4.22.070. All acts allegedly committed by Patricia under the power of attorney that allegedly caused harm to FLP or the limited partners, such as Tuttle, are the responsibility of the Estate. Per Annechino v. Worthy, 175 Wash. 2d 630, 638, 290 P.3d 126, 130 (2012) citing to Eastwood v. Horse Harbor Found., Inc., 170 Wash.2d 380, 400, 241 P.3d 1256 (2010); an agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party. citing to Restatement (Third) of Agency § 7.02. The Supreme Court further held " we have adopted the rule that 'when the agent, so acting within the scope of his employment as to bind his principal, honestly believes representations made by him to induce the purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort.' " Annechino at 638.

[2] The only route for Tuttle to claim harm is to claim title, which again is what give Hicklin and the Trust interest is seeing the trial court upheld.

Similar to an authorized agent's protection from liability when dealing on behalf of a disclosed principal, we find that agents are not personally liable for quasi-fiduciary duties that may arise when dealing on behalf of a disclosed principal where the agent does not independently owe a duty to the third party and does not knowingly make misrepresentations. Id.

Tuttle never showed the duty that Hicklin owed to him while she used the power of attorney in agreeing to DNR's request. The duty that Hicklin owed, if and when she used the power of attorney, (CP 226) was to Anita. If Hicklin caused harm to the other limited partners when agreeing, under the authority of the Anita's power of attorney, to DNR's request, pursuant to RCW 4.22.070 and the holding in Annechino, she is not personally liable. The only claim that the limited partners may have is against the general partner, Anita, and therefore against FLP. No evidence of actual harm has been provided.

The legal conclusion that Patricia does not have any personal liability for the unspecified acts in this case is bolstered by RCW 25.10.391.

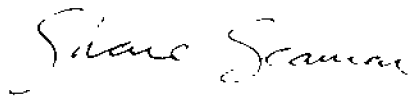
> If, in the course of the limited partnership's activities or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, **the limited partnership is liable for the loss.**

[emphasis added] RCW 25.10.391.

F. CONCLUSION

The trial court did not err, and this Court should uphold the dismissal. Tuttle's claims are barred under the doctrine of res judicata, his new claim of trespass gives Hicklin and the Trust standing to contest, the title claim was property disposed of because if remanded, will subject Hicklin and the Trust to claims already litigated in the FLP case. Tuttle's claims should be dismissed on the merits.

Dated this 2nd, March, 2017



Shane Seaman, WSBA #35350
18887 Hwy 305, Suite 1000
Poulsbo, WA 98370
(360)598-2350
shane@crosssoundlaw.com -Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on March 2, 2017, I sent a copy of the foregoing document by mail to:

Attorney for Appellant-Plaintiff Robert E. Tuttle, Jr.
David V. Johnson
Johnson, Rutz & Tassie
804 South Oak Street
Port Angeles, WA 98362

Attorney for Respondent Estate of Anita D. Tuttle, Patricia Hicklin, personal representative:

Patrick M. Irwin
Platt Irwin Law Firm
403 S. Peabody Street
Port Angeles, WA 98362

Attorney for Tuttle Family Limited Partnership, Eric Anderson, general partner:

Craig L. Miller
Craig L. Miller & Associates, P.S.
711 East Front St., Suite A
Port Angeles, WA 98362

Attorney for Doreen hunt, Co-Trustee, Robert E. Tuttle Sr. Testamentary Trust u/w/d 11-17-1993:

Barry C. Kombol
Law Office of Rainier Legal Center
PO Box 100
Black Diamond, WA 98010

DATED this _____ day of March, 2017 at Poulsbo, Washington

_____
Nancy Reid, Legal Secretary

CROSS SOUND LAW GROUP
March 03, 2017 - 11:55 AM
Transmittal Letter

Document Uploaded: 5-496691-Respondents' Brief.pdf

Case Name: Robert E Tuttle v Estate of Anita D. Tuttle at. el

Court of Appeals Case Number: 49669-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

■ Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Nancy Reid - Email: nancy@crosssoundlawgroup.com

A copy of this document has been emailed to the following addresses:

nancy@crosssoundlaw.com
shane@crosssoundlaw.com
djberger@plattirwin.com
pmirwin@plattirwin.com
lindsey@world.oberlin.edu
dave@jrtlaw.com
barry@rainierlegal.com
cmiller@craiglmiller.com